

BEFORE THE DEPARTMENT OF ADMINISTRATION  
OF THE STATE OF MONTANA

In the matter of the amendment of ARM ) NOTICE OF AMENDMENT AND  
2.5.502 and adoption of New Rule I ) ADOPTION  
pertaining to contract security )

TO: All Concerned Persons

1. On November 6, 2008, the Department of Administration published MAR Notice No. 2-5-407 regarding the proposed amendment and adoption of the above-stated rules at page 2310 of the Montana Administrative Register, Issue No. 21. On November 26, 2008, a public hearing was held on the proposed rule amendment and adoption. Several comments were received by the December 5, 2008, deadline.

2. The department has thoroughly considered all comments received. A summary of the comments received and the department's responses are as follows:

COMMENT 1: Proposed NEW RULE I appears to impose a mandatory obligation upon agencies to state that security can be released, even if the contract has not been satisfactorily performed. The proposed wording does not appear to contemplate the situation where the contract has not been fully performed, or there is an unexpired warranty period, or there is some dispute between the agency and the contractor in which release of the security is not appropriate.

Rather than using the phrase "stating that," the commenter suggested that the phrase "stating whether" would be more appropriate, and allow an agency to identify that a problem or dispute exists regarding the contract.

RESPONSE 1: The department's intent was to require notification regarding the successful completion of a contract that required performance security, including any warranty period. To clarify the intent and process, the department has revised both NEW RULE I (ARM 2.5.305) and ARM 2.5.502 as shown below.

COMMENT 2: If the language in proposed NEW RULE I is changed as suggested, then there will need to be a modification to the proposed amendments to ARM 2.5.502(8). As proposed, there will be an automatic return of the contract security (other than of bonds) triggered by receipt of an agency's notice under NEW RULE I. ARM 2.5.502(8) could be modified to provide for return of the security upon receipt of notification of the agency's waiver of rights and claims to the security.

RESPONSE 2: ARM 2.5.502 has been revised to more clearly state that required contract security is to be returned only after an agency waives all rights and claims to the performance security.

COMMENT 3: The "expiration of the contract" may not always be the appropriate trigger to start the 30-day clock running for notification by the agency to the Department of Administration. A contract (or a portion of a contract) may be completed early, and it may be appropriate to release security before the term of the contract has expired, if the contractor has fully and successfully performed. The commenter suggested that instead of using the language "Within 30 days of" that the department consider instead the phrase "Not later than 30 days after." Making the change will give an agency the ability to provide the notice of release of claims against the contract security as soon as the agency is ready to do so, irrespective of whether the contract term has expired or not.

RESPONSE 3: The department concurs and has made the suggested change.

COMMENT 4: Finally, the commenter is unclear whether the "expiration of the contract" trigger was intended to mean the expiration of any warranty period provided by the contract. It may be that if an agency can notify the Department of Administration that because of a warranty period, the agency is not waiving its rights and claim to the security, then that is sufficient. If some other approach is ultimately adopted by the Department of Administration, however, then that approach ought to take into account the fact that the warranty period may well exceed the duration of the contract's term.

RESPONSE 4: Typically, when a warranty is required, the contract will be written so that expiration date of the contract and warranty will coincide. In cases where a warranty period extends beyond the contract period, the contract should specify that the required security will be held until the successful completion of the warranty period. The rules have been amended to take this possible situation into account.

3. In addition to the changes to the rules based on comments received, the department has revised the rules as proposed to 1) clarify that notification shall be made to an agency's own contracting office if the contract originated with that office, and 2) specify that if a claim against the contract security is being considered, that the office originating the contract shall be notified.

4. The department has amended and adopted the rules as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

2.5.502 BID, PROPOSAL, AND CONTRACT PERFORMANCE SECURITY

(1) through (7)(g) remain as proposed.

(8) The division shall timely return to the contractor all contract performance security, except bonds, following ~~the division's receipt of the notice~~ notification to the division that:

(a) the contract was satisfactorily completed; and

(b) the agency waives all rights and claims to the performance security as described in ARM 2.5.305.

AUTH: 18-4-221, 18-4-312, MCA  
IMP: 18-1-201, 18-4-312, MCA

RULE I (2.5.305) COMPLETION NOTIFICATION FOR CONTRACTS WITH PERFORMANCE SECURITY (1) ~~Within 30 days of the expiration of~~ When a contract requiring performance security ends, regardless of the reason, the contracting agency shall provide written notification stating that to:

(a) the division, if the contract was established through the State Procurement Bureau; or

(b) the agency's contracting office, if the contract was established under the agency's delegated authority.

(2) This written notification shall be provided:

(a) not later than 30 days after the ending date of the contract; or

(b) if a warranty period that extends beyond the end of the contract term is specified in the contract, not later than 30 days after the ending date of the warranty.

(3) The required notification shall include, at a minimum, the following information:

(a) whether the contract has been successfully performed and, if a warranty period is specified in the contract, that no claims are pending under the warranty; and

(b) whether the agency waives all rights and claims to the contract security.

(4) If the contract was not satisfactorily completed, and a claim against the performance security is being considered, timely notification of such a situation shall be made to:

(a) the division, if the contract was established through the State Procurement Bureau; or

(b) the agency's contracting office, if the contract was established under the agency's delegated authority.

~~(2) If the contract was established through the State Procurement Bureau, the notification shall be provided to the division. If the contract was established within an agency's delegated authority, the notification shall be provided to the agency's contracting office.~~

AUTH: 18-4-221, 18-4-312, MCA  
IMP: 18-4-312, MCA

By: /s/ Janet R. Kelly  
Janet R. Kelly, Director  
Department of Administration

By: /s/ Michael P. Manion  
Michael P. Manion, Rule Reviewer  
Department of Administration

Certified to the Secretary of State December 15, 2008.